

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

ALLIED-GENERAL NUCLEAR SERVICES, ET AL., Petitioners

v.

NATIONAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

COMMONWEALTH EDISON COMPANY, ET AL., Petitioners

v.

NATIONAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

WESTINGHOUSE ELECTRIC CORPORATION, Petitioner

v.

NATIONAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

**BALTIMORE GAS AND ELECTRIC COMPANY, ET AL.,
Petitioners**

v.

NATIONAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

**On Writs of Certiorari to the United States Court of Appeals
for the Second Circuit**

**PETITIONERS' CONSOLIDATED RESPONSE TO THE
GOVERNMENT'S SUGGESTION OF MOOTNESS**

January 9, 1978

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The Solicitor General, in his Suggestion of Mootness, has urged that this Court should vacate the Second Circuit's judgment and remand the case to that court with instructions to dismiss the petitions for review.

The Government's Suggestion of Mootness is based on the Nuclear Regulatory Commission's Order dated December 23, 1977 (appended to the Government's Suggestion of Mootness). That Order, among other things, terminates the Commission's GESMO proceeding, terminates certain plutonium-recycle-related licensing proceedings, and expressly withdraws the Commission's November 1975 policy statement.

The November 1975 policy statement is the subject matter of the four consolidated cases now pending in this Court on grants of certiorari (430 U.S. 944). The cases presented important questions whether—as petitioners contend—the Second Circuit committed error by striking down the substance of the Commission's November 1975 policy statement concerning interim licensing. However, it must be recognized that for the Commission's November 1975 interim licensing policy to be rescinded, in a context also terminating the individual licensing proceedings in which such interim licensing might have occurred, would render moot the questions which were presented. Compare *EPA v. Brown*, 431 U.S. 99, 103-104 (1977); *Geduldig v. Aiello*, 417 U.S. 484, 491-492 (1974); *Richardson v. Wright*, 405 U.S. 208 (1972). Accordingly—at least if one assumes that the Commission's December 23, 1977, Order is not overturned—the Government is correct in submitting that the Second Circuit's judgment be vacated as moot.

But it should not be overlooked that efforts may be made to obtain judicial review of the Commission's December 23, 1977, Order. Such a petition for review could be filed not only by someone who is a party in this Court, but also by various others. As a result, the vitality of the Commission's new Order remains subject to some inherent uncertainty at least until the 60-day period provided by 28 U.S.C. §§ 2342-2344 and 42 U.S.C. § 2239 has elapsed;* or if a petition for judicial review were to be filed, then until the petition for review has been finally disposed of. Instead of acting immediately on the Government's present Suggestion of Mootness, we suggest this Court should leave the matter in abeyance awaiting a further report from the parties after the 60-day period has run. Otherwise, if a petition for review were filed and if ultimately the December 23, 1977, Order were overturned, this Court might find it appropriate to recall its mandate with respect to mootness.

* The Commission's December 23, 1977 Order states that "The Commission will shortly publish a statement of the reasons underlying this decision." Such a statement of reasons has not yet been published; hence, it may not be clear when the 60-day period begins to run. In any event, the Commission's December 23 Order was not docketed until December 27 and, so far as we are aware, not released until December 27. It was published in the Federal Register for December 30 (42 F.R. 65334).

One of the parties in this Court (Exxon Nuclear Company, Inc., a Petitioner in No. 76-762) on December 30 filed with the Commission a request that the time to petition for reconsideration of the Commission's December 23 Order be extended until ten days after service of the Commission's statement of underlying reasons; or, if such request is not granted, then until January 16, 1978.

Respectfully submitted,

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